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MAY 28 1940

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1939.

No. 553 1

MILK WAGON DRIVERS UNION OF CHICAGO,
LOCAL 753, a Voluntary Unincorporated Association;
ROBERT G. FITCHIE, JAMES KENNEDY,
STEVE SUMNER, FRED O. DAHMS, F. RAY
BRYANT, ALBERT O. RICHARDS, JOSEPH L.
PATTERSON and DAVID RISKIND,

Petitioners,

vs.

MEADOWMOOR DAIRIES, INC., a Corporation,
Respondent.

OBJECTIONS TO PETITIONERS' MOTION FOR
LEAVE TO FILE SECOND PETITION FOR RE-
HEARING UPON THE ORDER OF OCTOBER 23,
1939 DENYING CERTIORARI TO THE SUPREME
COURT OF ILLINOIS.

DONALD N. SCHAFER,

EDWARD M. KEATING,

Counsel for Respondent.

JOSEPH R. ROACH,

Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1939.

No. 353

MILK WAGON DRIVERS UNION OF CHICAGO,
LOCAL 753, a Voluntary Unincorporated Association;
ROBERT G. FITCHIE, JAMES KENNEDY,
STEVE SUMNER, FRED O. DAHMS, F. RAY
BRYANT, ALBERT O. RICHARDS, JOSEPH L.
PATTERSON and DAVID RISKIND,

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vs.

MEADOWMOOR DAIRIES, INC., a Corporation,
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**OBJECTIONS TO PETITIONERS' MOTION FOR
LEAVE TO FILE SECOND PETITION FOR RE-
HEARING UPON THE ORDER OF OCTOBER 23,
1939 DENYING CERTIORARI TO THE SUPREME
COURT OF ILLINOIS.**

Now comes MEADOWMOOR DAIRIES, INC., a corporation,
respondent, by Donald N. Schaffer, its counsel, and objects
to the petitioners' motion for leave to file a **second** Peti-
tion for Rehearing upon the order of October 23, 1939,

denying certiorari to the Supreme Court of Illinois, for the reasons set forth in the attached suggestions.

Respectfully submitted, *

DONALD N. SCHAFER,

EDWARD M. KEATING,

Counsel for Respondent.

JOSEPH R. ROACH,

Of Counsel.

SUGGESTIONS IN OPPOSITION TO MOTION FOR
LEAVE TO FILE SECOND PETITION
FOR REHEARING.

I.

The cases upon which petitioners predicate their Motion for Leave to File a Second Petition for Rehearing were considered in their First Petition for Rehearing which this Court denied.

The Petition for Writ of Certiorari to the Supreme Court of Illinois was denied on October 23, 1939 (84 L. Ed. 95). The petitioners thereupon filed a Petition for Rehearing, and while that petition was pending they filed a motion citing an additional authority on said petition. On December 4, 1939, the Court denied their Petition for Rehearing (84 L. Ed. 221).

Petitioners contend that they are warranted in asking leave to file a second Petition for Rehearing because this Court has granted certiorari in two cases where, according to petitioners, the same question is presented for determination as was raised in the instant case.

Petitioners have neglected to advise this Court that these cases were cited to the Court in their first Petition for Rehearing, in which they advanced the same arguments for reconsideration of the Court's action in denying their Petition for Certiorari as they present in their present motion.

Swing v. American Federation of Labor (372 Ill. 91), Docket No. 929, October Term, 1939, in which certiorari was granted on May 20, 1940, was cited in their Petition

for Rehearing, and petitioners there contended that the decision in the *Swing* case demonstrated that the award of the injunction in the instant case did not rest upon the violence of which the petitioners were found guilty by the Illinois courts.

Milk Wagon Drivers Union, Local 753, etc. v. Lake Valley Farm Products, Inc., et al., Docket No. 770, October Term, 1930, certiorari to the Circuit Court of Appeals for the Seventh Circuit granted on April 1, 1940 (84 L. Ed. 650), was the case cited by petitioners as an additional authority on their Petition for Rehearing. In their motion for leave to cite this case as an additional authority, petitioners stated the basis of their first petition for rehearing, as follows:

"In their petition for a rehearing of the order of October 23, 1939, denying certiorari, petitioners (pp. 4-7) have pointed out that Court decisions *subsequent* to the judgment sought to be reviewed herein have *not* based their decisions in enjoining 'peaceful picketing' on the ground of violence."

It thus appears that petitioners are predicated their present motion upon the same contentions and are using the identical cases which they advanced and cited to this Court in their first Petition for Rehearing. Petitioners by their present motion present nothing which they have not already submitted to the Court upon their first Petition for Rehearing.

II.

Petitioners fail to state that their Petition for a Writ of Certiorari was opposed on jurisdictional grounds.

One of the principal grounds urged by this respondent in opposition to the Petition for a Writ of Certiorari was that the record did not show that the Federal question

set forth therein had been properly presented or preserved for review by this Court.

Respondent contended in its brief in opposition (pp. 11-18) that this Court was without jurisdiction for the following reasons:

- (a) Petitioners failed to claim any right under the Federal Constitution in the proceedings in the courts below.
- (b) Petitioners stated upon the record before the Supreme Court of Illinois *that no question under the Federal Constitution was involved in this case*. (See p. 2 of Respondent's Exhibit to Suggestion of Diminution of the Record.)
- (c) The Supreme Court of Illinois did not consider or decide any Federal question. Its discussion of the right of free speech was with respect to the right under the Constitution of Illinois and was so treated by petitioners in their petition for rehearing in that court (R. 480).
- (d) The decision of the Illinois Supreme Court rested upon non-federal grounds adequately supporting its judgment.

Where a petition for a writ of certiorari is denied, the reasons for the denial do not generally appear. It cannot be said for a certainty whether the order denying certiorari in this cause was grounded upon lack of jurisdiction or upon consideration of the merits of the Federal question set forth in the petition. However, there is a substantial basis for assuming that the Court's action in this cause was predicated upon lack of jurisdiction. In the same order, entered October 23, 1939, denying the petition for a writ of certiorari to the Supreme Court of Illinois, this Court granted respondent's motion for a writ of certiorari in relation to a diminution of the record suggested by respondent (84 L. Ed. 95).

The portion of the record omitted by the petitioners,

which this Court directed to be supplied, was a motion by petitioners before the Supreme Court of Illinois, in which petitioners admitted that no question under the Federal Constitution was involved in this case.

It would seem quite probable that the denial of the Petition for a Writ of Certiorari was grounded upon the fact that this Court was without jurisdiction for the reasons urged in opposition thereto. If we are correct in this assumption, the fact that certiorari has been granted in the two cases cited in the present motion is of no moment. An examination of the brief in opposition to the petition for certiorari in the *Swing* case shows that no jurisdictional question was there raised. The jurisdictional question urged in the instant case could not have been raised in the *Lake Valley Farm Products* case, where certiorari was granted to a lower Federal Court.

CONCLUSION.

The petitioners' present motion presents the same contentions which they submitted to the Court in their first Petition for Rehearing. The subsequent action of this Court in granting certiorari in the two cases cited by petitioners is not ground for the relief prayed, since different issues were before the Court and there is a strong probability that certiorari was denied in the instant case for lack of jurisdiction. We respectfully submit that petitioners' motion for leave to file a second Petition for Rehearing in this cause should be denied.

Respectfully submitted,

DONALD N. SCHAFER,
EDWARD M. KEATING,

Counsel for Respondent.

JOSEPH R. ROACH,
Of Counsel.

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